IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-377



GILBERT D. SCUDDER,

Appellant,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,
L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Appellees.

On Appeal from the Supreme Court of the

State of Florida

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Motion to Dismiss Appeal

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# I N D E X

TABLE OF AUTHORITIES

OTHER AUTHORITIES



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MOTION OF APPELLEE, FLORIDA POWER CORPORATION, TO DISMISS APPEAL

Appellee, FLORIDA POWER CORPORATION, moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question and the judgment of the lower court rests on an adequate non-federal basis.

This is an appeal asserting that Florida Statutes, §§704.01(2) and 704.04 are repugnant to the Constitution of the United States by denying Appellant SCUDDER equal protection of the laws and due process of law and further denying him a right to trial by jury.

Florida Statute §704.01(2) creates a statutory way of necessity permitting a hemmed-in owner of property to use and maintain an easement over lands lying between his hemmed-in property and the nearest public or private road. Florida Statute §704.04 creates a judicial remedy to determine if such condition exists, and if so, the location, extent and type of easement. This section further provides for a determination of the compensation to be paid for the use of such easement and permits the amount of compensation to be determined by a jury trial.

In the proceedings brought in the state court in Florida, a statutory way of necessity was granted across property owned by Appellant SCUDDER to permit ingress and egress, electricity and telephone service to residential property owned by the Appellees FOLSOM. Compensatory damages for the easement were awarded in the amount of $7,400.00, together with an additional sum of $500.00 compensatory damages for an alleged trespass by FLORIDA POWER CORPORATION.

Appellant SCUDDER argues that the failure of the court to award him attorney's fees as "just compensation" violated his rights to due process of law and equal protection of the laws.

THERE IS NO BASIS TO APPELLANT'S CLAIM OF DUE PROCESS VIOLATION

Appellant's claim of Fourteenth Amendment due process violation is predicated upon what is claimed to be a taking

of his property for the statutory way of necessity without just compensation. The trial court specifically awarded the sum of $7,400.00 as compensation for the easement across Appellant's land but declined to award any attorney's fees as damages to Appellant. Appellant argues that the award of $7,400.00 without an additional award taxing attorney's fees for the services of his attorneys, results in a taking of his property without just compensation.

Federal courts have consistently refused to award property owners any amount to indemnify them for attorney's fees and other expenses incurred in the litigation because of the absence of statutory authority. Dohaney v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); United States v. 2,353.28 Acres of Land, Etc., State of Florida, 414 F.2d 965 (5th Cir.1969); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d 53 (9th Cir.1968).

The right to recover attorney's fee from one's opponent in litigation as a part of costs did not exist at common law. 20 Am Jur 2d, Costs §72. The term "costs" or "expenses" as used in the statute is not understood ordinarily to include attorney's fees. Id. The State of Florida does not permit recovery to the prevailing party for attorney's fees in the absence of a contractual or statutory provision. Phoenix Indemnity Co. v. Union Finance Co., 54 So.2d 188 (Fla. 1951); Joseph v. Houdaille-Duval-Wright Co., 213 So.2d 3 (Fla. 3d DCA 1968). Constitutional requirements of just compensation for the taking of land by eminent domain do not include attorney's fees. United States v. 4.18 Acres of Land, Etc., 542 F.2d 786 (9th Cir.1976).

In Florida, eminent domain proceedings brought by the State of Florida or its political subdivisions are governed by

Chapter 73, Florida Statutes. In particular, Florida Statutes §73.091 provides that the condemning authority shall pay all reasonable costs including a reasonable attorney's fee to be assessed by the Court. It is important to note that in Florida, attorney's fees are awarded to property owners in the case of condemnation action by public authorities, but only due to the existence of specific statutory authority.

In the recent case of Estate of Hampton v. Fairchild-Florida Construction Co., 341 So.2d 759 (Fla. 1977), the Supreme Court of Florida specifically reviewed the question whether attorney's fees were properly awardable in a proceeding to establish a statutory way of necessity pursuant to §704.01(2), Florida Statutes (1975). The court noted that generally attorney's fees are not recoverable unless a statute or contract specifically authorizes their recovery, or unless equity allows attorney's

fees from a fund or estate which has been benefited by the rendering of legal services. Id. at 761. The court concluded that proceedings to establish a statutory way of necessity did not stand on the same footing as condemnation actions by the state of Florida in its sovereign capacity and determined that there was no basis for the award of attorney's fees in actions brought under §704.01(2). See also Tomten v. Thomas, 125 Mont. 159, 232 P.2d 723 (1951) in which the court denied attorney's fees in a proceeding to establish a statutory way of necessity.

The Fourteenth Amendment to the United States Constitution does not require an award of attorney's fees in the establishment of a statutory way of necessity between private owners of adjacent land. No Florida statute requires the payment of attorney's fees in an action to establish a statutory way of necessity. The decisions of the

courts in Florida denying attorney's fees in such cases are properly founded on an adequate non-federal basis.

## FLORIDA STATUTE §§704.01(2) AND 704.04 ARE RATIONALLY RELATED TO A LEGITIMATE STATE END AND THE MEANS EMPLOYED ARE RATIONALLY RELATED TO THE PURSUIT OF THAT END

The controlling principles with reference to permissable classification by state legislatures with respect to claims of denial of the equal protection of the laws in violation of the Fourteenth Amendment are too well-settled to require elaboration. In McDonald v. Board of Election, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), this court said:

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state

end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See McGowan v. Maryland, 366 U.S. 420 (1961); Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947; Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911). With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," Williamsson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See Ozan Lumber Co. v. Union County National Bank, 207 U.S. 251 (1907)" (p. 808-809)

This Court has further said:

"The equality at which "the equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws," and laws are not abstract propositions. They do

not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they are the same." Tigner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1724 (1940).

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Capital Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some economic or social philosophy. ... We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U.S. 726, 729, 730, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963).

Florida Statute §§704.01(2) and 704.04 provide a judicial remedy for a person whose lands are shut-off or hemmed-in to acquire a statutory way of necessity across his adjoining neighbor's land to a public or private road by means of the nearest practical route. Compensation for the use of

the easement is to be awarded either by the court, or if demanded by either party, by a jury trial. Similar statutes have been passed in many states providing such a procedure by which an individual may have the property of another condemned for the purpose of making a necessary private road or a way of necessity to his property. See 29A C.J.S., Eminent Domain §34, P. 275; Ruddock v. Bloedel Donovan Lumber Mills, 28 F.2d 684 (9th Cir.1928); Gaines v. Lunsford, 120 Ga. 370, 47 S.E. 967 (1904); Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S.W. 762 (1907); Tomten v. Thomas, 125 Mont. 159, 232 P.2d 723 (1951); McKenney v. Anselmo, 416 P.2d 509 (Idaho 1966); Cienega Cattle Co. v. Atkins, 59 Ariz. 287, 126 P.2d 481 (1942); Flora Logging Co. v. Boeing, 43 F.2d 145 (D.C. Ore. 1930); Hellberg v. Coffin Sheep Company, 404 P.2d 770 (Wash. 1965); Fanning v. Gilliliand, 37 Or. 369, 61 P. 636, 62 P.

209 (1900); State ex rel. Eastern Ry. & Lumber Co. v. Superior Court, 127 Wash. 30, 219 P. 857 (1923).

In Deseret Ranches of Florida, Inc. v. Bowman, 349 So.2d 155 (Fla. 1977), the Supreme Court of Florida reviewed Florida Statute §704.01(2) and §704.04 and determined that these statutes granting a statutory way of necessity were not unconstitutional on the ground that it permitted taking of property for a private rather than public purpose. Specifically, the Supreme Court of Florida found that the statute's purpose is predominently public and the benefit to the private land owner is incidental to the public purpose, ennunciating the public purposes as follows:

> ". . . sensible utilization of land continue to be one of our most important goals. We take notice that Florida grows in population at one of the fastest rates of any state in the nation. Useful land becomes more scarce in pro-

> portion to population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stock-raising, the statute is designed to fill these needs. There has been a clear public purpose in providing means of access to such lands so that they might be utilized in the enumerated ways." (p. 156)

Appellant SCUDDER argues however that the failure to permit an award of attorney's fees in the case of a "private" taking of his property for a statutory way of necessity denies him equal protection of the laws since he would be entitled to an award of attorney's fees pursuant to Florida Statute §73.091 in the event of a "public" taking.

As noted earlier, federal courts have refused to award attorney's fees in eminent domain proceedings in the absence of statutory authority. Dohaney v. Rogers, supra. The fact that the Floria legis-

lature by statute permits the private owner to recover reasonable attorney's fees in the event of a public taking can be justified in order to put the private owner on a parity with the condemning authority during the litigation. However, this same rational would not apply to an action by a private individual seeking a statutory way of necessity across his adjoining neighbor's land.

There are numerous examples where one litigant is permitted attorney's fees to the exclusion of another. For example, the principal is established that if a classification is otherwise reasonable, the mere fact that attorney's fees are allowable to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the equal protection clause. See Missouri, K. & T. R. Co. v. Cade, 233 U.S. 642, 34 S.Ct. 678, 58 L.Ed. 1135 (1914); Hunter v. Flowers, 43 So.2d 435 (Fla. 1949).

Statutes which permit an attorney's fee to be awarded to the insured in a suit brought by him against the insurance carrier seeking coverage under the insurance policy have been held to be not violative of the equal protection clause. Brandywine Shoppe, Inc. v. State Farm Fire & Casualty Co., 307 A.2d 806 (Del. 1973); Coker v. Pilot Life Insurance Co., 265 S.C. 260, 217 S.E.2d 784 (1975); Iowa National Mutual Insurance Co. v. City of Osawatomie, Kansas, 458 F.2d 1124 (10th Cir.1972).

Florida has affirmed the constitutionality of its statute providing for an attorney's fee to a successful insurance claimant under the doctrine that the attorney's fee may be imposed on the delinquent insurance company under the police power of the state as a penalty incurred in the conduct of a business affected with public interest. United States Fire Insurance Co. v. Dickerson, 82 Fla. 442, 90 So. 613 (1921).

This Court in Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644 (1915) sustained a federal statute allowing a reasonable attorney's fee to a plaintiff successful in an action to recover damages from a common carrier resulting from the violation of interstate commerce provisions, adding that there was also a legislative purpose to encourage the payment of just demands without suit. And again, in Life & Casualty Ins. Co. v. McCray, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987 (1934) this court, despite equal protection and due process arguments, upheld an Arkansas Statute allowing a life insurance policy holder a reasonable attorney's fee upon wrongful refusal of payment by the insuror, and noted that diversity of treatment in respect of the costs of litigation has its origin and warrant in diversity of social need. To the same effect is the Florida court in Fellow v. Equitable Life Assurance Society, 57 So.2d 581 (Fla. 1952).

The Supreme Court, in Dohaney v. Rogers, supra, in a Michigan case involving eminent domain, noted that a state may allow the recovery of an attorney's fee in special classes of proceedings while withholding them in others. The Court further held that in condemnation proceedings a state had the power to classify those whose property was taken and to allow the one class expenses not granted to another. The court recognized that a permitted classification necessarily involves the allowance of attorney's fees to some but a denial of their recovery to others. Against arguments of due process and equal protection, this court in Dohaney v. Rogers, supra, upheld the Michigan Statute which denied attorney's fees in the case of highway condemnation but permitted attorney's fees in the case of railroad condemnation proceedings.

In the instant case, Appellant SCUDDER claims a denial of equal protection of the

laws since he is not permitted attorney's fees in a "private" taking for a statutory way of necessity, but would be permitted attorney's fees by statute if this were a "public" taking. Obviously, the classification permitting attorney's fees for eminent domain proceedings by public authorities but precluding attorney's fees under private taking for statutory way of necessity is a reasonable classification. The attempt to put the private property owner on a parity with the public condemning authority is a sufficient basis to justify the classification.

## THE TRIAL PROCEEDINGS DID NOT DEPRIVE APPELLANT OF HIS RIGHT TO TRIAL BY JURY

Florida Statute §704.04 specifically provides that a landowner may have a jury determine the amount of compensation to be awarded for the statutory way of necessity. In the instant case, a jury was impaneled to hear the legal issues relating to whether

or not a trespass had ocurred and if so, the amount of damages to be awarded Appellant for the trespass. Likewise, this jury was impaneled to consider the amount of compensation to be awarded for any taking of Appellant's property for a statutory way of necessity. (Appellant's Appendix P. 154)

Although both the Florida Constitution and the United States Constitution contain provisions relating to the "right to trial by jury", both Florida and Federal courts have held that there is no absolute constitutional right to a trial by jury in eminent domain proceedings. This is because the purpose of the constitutional provisions is to preserve and protect the common-law right to a jury trial and the right to a jury trial in condemnation proceedings did not exist at common law. See United States v. Reynolds, 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970); Carter v. State Road Department, 189 So.2d 793 (Fla. 1966). Accordingly, no

deprivation of Appellant's constitutional right to trial by jury exists by reason of the fact that the trial court elected to determine first whether a statutory way of necessity existed and, if so, to determine the nature, extent and location of such easement. In fact, Florida Statute §704.04 specifically provides that the court shall make this determination. This procedure likewise is consistent with eminent domain proceedings by a "public" authority since in all such instances, the Court first makes a determination as to whether or not there is to be a taking, and only in that event is the matter submitted to a jury for compensation. Again, this is the same procedure as provided in Florida Statute §704.04 permitting a jury to determine the compensation for the statutory way of necessity.

In the instant case, the parties stipulated that the issue of whether or not a trespass occurred and the issue of damages

both for the trespass and as compensatory damages for the statutory way of necessity were to be determined solely by the court and that the jury previously impaneled would be discharged. (Appellant's Appendix p. 159-161) Upon the specific questioning by the court, counsel for appellant agreed to presenting those issues to the court. (Appellant's Appendix p. 161) Since there is neither a constitutional guaranty nor requirement of a trial by jury in either federal or state constitutions, it follows that the parties may waive trial by jury and submit the issues of just compensation to the court. In re Shambow's Estate, 153 Fla. 762, 15 So.2d 837 (1943); Rodenbur v. Kaufmann, 320 F.2d 679 (D.C. Cir.1963). Since appellant waived his right to have a jury determine the amount of compensation for the statutory way of necessity and further waived his right to have a jury determine the issues of whether a trespass occurred,

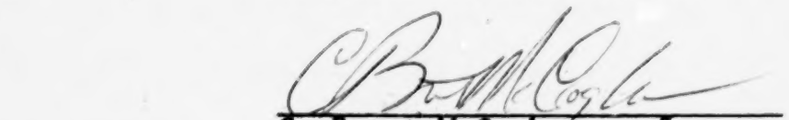
and if so, the damages to be awarded for such trespass, appellant cannot now complain of any violation of right to trial by jury.

## CONCLUSION

Just compensation and requirements of due process of law do not require an award of attorney's fees to Appellant SCUDDER in state proceedings by a private land owner to establish a statutory way of necessity over Appellant's land. Further, the classification adopted by the Florida legislature in limiting recovery of attorney's fees to eminent domain proceedings brought by public and quasi public authorities but denying attorney's fees in private actions brought under §704.01(2) is within the permissable limits long recognized by this court. Finally, appellant waived any right to a jury trial on the issues of trespass and compensation. Accordingly, no substantial federal question is involved.

Appellee's Motion to Dismiss Appeal should be sustained.

Respectfully submitted,



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## PROOF OF SERVICE

I, C. Brent McCaghren, of WINDERWEEDLE, HAINES, WARD & WOODMAN, P.A., attorneys for FLORIDA POWER CORPORATION, appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of October, 1978, I served three copies of the foregoing Motion to Dismiss on each of the several parties thereto, as follows:

On GILBERT D. SCUDDER, L. M. FOLSOM and PAULINE FOLSOM, by hand deliver to their respective attorneys of record, as follows:

To JACK B. NICHOLS, Esquire, attorney for appellant, GILBERT D. SCUDDER, 108 E. Hillcrest Street, Orlando, Florida 32802;

To JOHN H. RHODES, JR., Esquire, attorney for L. M. FOLSOM and PAULINE FOLSOM,

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